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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1492

S.T.G. CONSTRUCTION CO., INC., *Petitioner,*

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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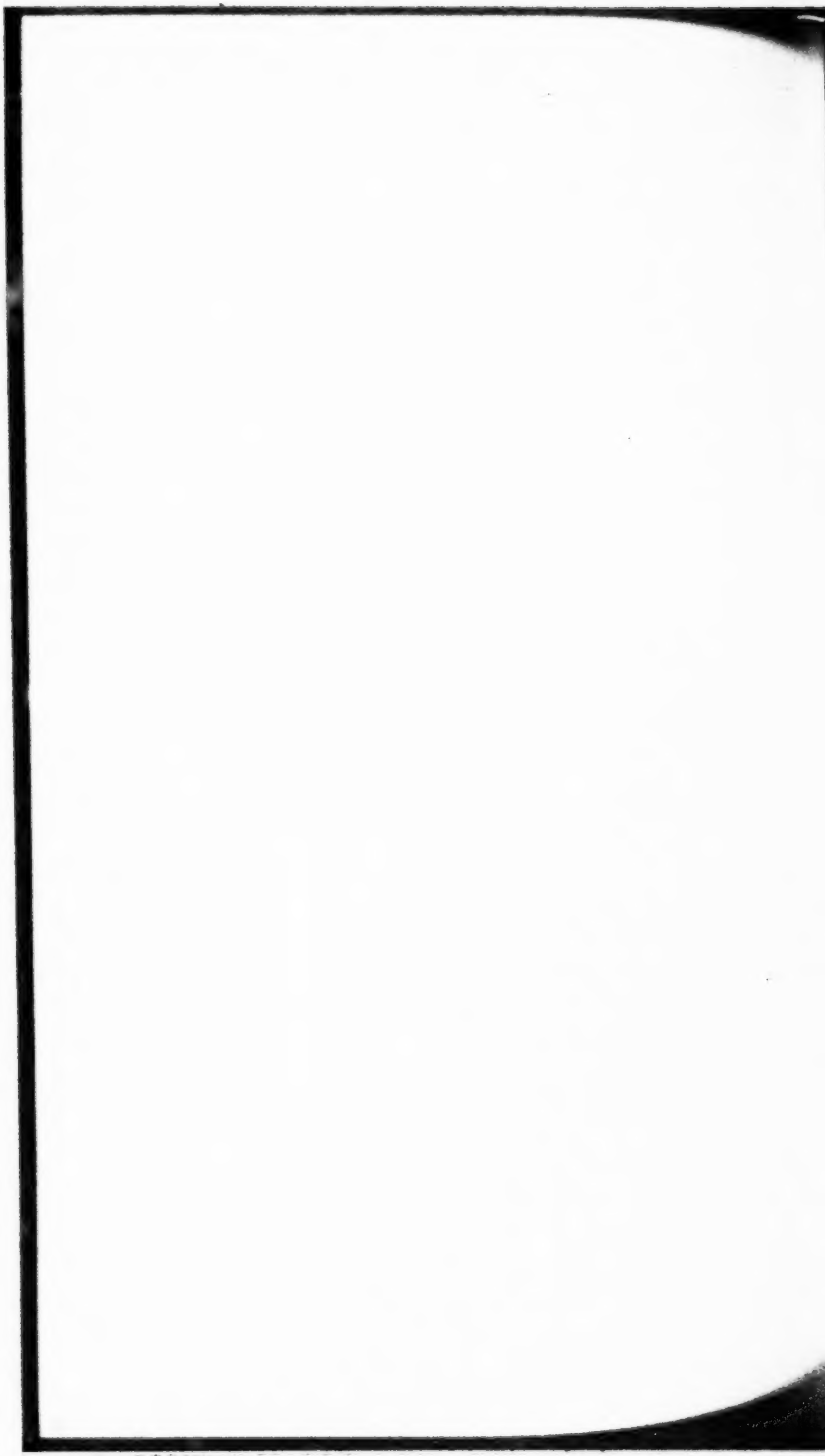

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Preliminary Statement

S.T.G. Construction Co., Inc. (hereinafter "S.T.G."), one of the defendants below, has petitioned for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered on January 26, 1970, which affirmed a judgment entered on December 3, 1968 in the United States District Court for the Southern District of New York in favor of respondent, The Staten Island Rapid Transit Railway Company (hereinafter "S.I.R.T."), against petitioner and its surety, Continental Casualty Company, in the amount of $190,079.52. The judgment for plaintiff S.I.R.T. below was for completion costs arising out of S.T.G.'s failure to complete the work under a construction contract and

for actual damages suffered by S.I.R.T. by reason of the delay in completion.

The surety on the performance bond, Continental Casualty Company, which was an appellant in the Court of Appeals, petitioned that Court for a rehearing, but its petition was denied on February 24, 1970. Continental Casualty has not joined S.T.G. in this petition for a writ of certiorari. Therefore, the judgment has become final against it.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported in 421 F.2d 53 (2d Cir. 1970). The Memorandum Opinion and the Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of New York are unreported (Appendices D and F to petition).

Questions Presented

The questions suggested by S.T.G. are not fairly presented in that they incorporate, as factual premises, issues which were disputed in the Courts below and which were found against S.T.G. in the Trial Court and in the Court of Appeals. S.T.G. in its suggested questions refers to "detail specifications" as "concededly dangerous and impracticable" and to "the owner's admittedly defective detail specifications". There were no such concessions or admissions. The Trial Court found as a fact that the contract plans and specifications were practical and possible of performance by a competent contractor (Appendix F, pp. 50a, 51a) and the Court of Appeals agreed, specifically rejecting the argument that the railroad had supplied defective plans (Appendix A, p. 7a).

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The questions to be considered are:

1. Whether the Courts below were justified in finding as a fact that the contract plans and specifications relative to the fender system were feasible, practicable and possible of performance by a competent contractor and in their finding that S.T.G. was free to use any engineeringly sound and approved method to accomplish the end result, which was penetration of sheet pilings to specified elevations (810a).*

2. Whether the Courts below were justified in concluding that S.T.G. had failed to complete its contract, had in fact abandoned the work, and that S.I.R.T. was entitled to recover the cost of completion of Contract No. 3 above the original contract price (811a-812a).

Statement of the Case

The action was brought to recover damages incurred by reason of the defendant S.T.G.'s failure to complete a contract with S.I.R.T. for the demolition of an old pier structure in the middle of a navigable tidal water course, known as Arthur Kill, between Staten Island, New York, and New Jersey, the demolition of an old trestle and the construction of a system of fender cells to protect Pier No. 1 of the railroad bridge over the said Arthur Kill (5a-13a). Pier No. 1 had been built by another contractor. The Surety was sued on its performance and payment bond posted to S.T.G. under the contract (13a).

The case was tried without a jury before District Judge Harold R. Tyler, Jr. who found that S.T.G. had breached its construction contract by failing to complete the work required thereunder, that the contract plans and specifica-

*Unless otherwise indicated, references are to pages of the Appendix submitted to the United States Court of Appeals for the Second Circuit, which was submitted to this Court by the petitioner.

tions were feasible, practicable and possible of performance by a competent contractor and that the additional cost to the railroad over and above the original contract price came to $100,843.50, which plaintiff was entitled to recover against both defendants (Appendix F, p. 52a; 812a).

The Trial Court also held that the railroad was entitled to recover additional damages from the defendants for delay in the total sum of $36,416.04 (Appendix D, p. 23a; 991a). The Court of Appeals for the Second Circuit affirmed the judgment of the District Court in all respects.

The formal contract known as Contract No. 3 was entered into in writing between S.I.R.T. and S.T.G. on January 18, 1960 (Exhibit A, 999a-1034a). The contract was accompanied by and embraced by its terms specific plans which set forth S.T.G.'s basic responsibilities to achieve the work desired to be accomplished (Exhibit 1, 997a-998a).

One of the items of work required to be performed by S.T.G. was the construction of a series of eight cells flanking Pier No. 1 of a new bridge. The contract plans and specifications called for the erection of five of the cells designated as A, B, C, D and E along the northerly side of Pier No. 1 and three of the cells designated as F, G and H along the southerly side. Each of the cells was to be cylindrical in shape and approximately 27 feet in diameter. The circumference of each cell was to be constructed of interlocking sheet steel pilings, about 15 inches in width, which were to be anchored in the channel bed or driven to required tip elevations; some were to be driven merely to rock, but the sheet pilings for the cells nearer the channel, D, E, F and G were required to penetrate the rock to the extent necessary to permit the sheets to penetrate to the required tip elevations. The areas of the cells within the outer circumference of sheet piling were

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to be excavated and then filled with a heavy substance, such as broken stone or concrete and broken stone (795a).

The pertinent sections of the Contract Specifications relating to the construction of these fender cells are Article 2 (p. II-1), Article 4 (p. II-1) and Article 5 (p. IV-3) (1029a-1034a). From these it will be noted that the material inside the cells was merely to be excavated to good earth with rock to be removed, if necessary, to enable driving the sheet piling to the elevation shown on the drawings, except in Cells D and E, where rock was to be excavated to the extent necessary to permit driving the sheet piling to the required tip elevations as shown on the drawings (795a, 797a).

The contractor was required to protect the sides of the excavation with suitable sheeting, shoring and bracing, except that with the approval of the Engineer the contractor was allowed to slope the sides of the excavation instead of providing such protection (1029a).

The only problem was the excavation of rock in Cells D and E by an approved method to the extent necessary to permit the sheets to penetrate to the required tip elevation (796a-797a). The specifications contemplated as the recommended procedure excavation of rock in the dry with blasting to be employed adjacent to Pier No. 1 (Section II, Article 4 of Exhibit 2). The contract did not require this method. Section IV, Article 5 of the contract (Exhibit 2) provided only that rock shall be excavated "by an approved method" and that the work "shall preferably be done in the dry," requiring only that the sheet steel be driven to required elevations. The contract also provided in the same Article that the contractor was to submit for approval the method he proposed to use for the construction of the steel sheet piling cells (797a).

Admittedly, S.T.G., through its representatives, visited the work site on only one day before preparing its bid

(496a, 799a). It did not inspect the available core borings nor did it examine the information relating to the construction of Pier No. 1 which was available along with the core borings at S.I.R.T.'s Staten Island office (500a, 799a). This information and the plans for Contract No. 3 revealed that the existing sheet pilings surrounding Pier No. 1 were driven only to rock, that the pier foundation itself was at an approximate elevation of minus 50 feet below mean low water and that the foundation for Pier No. 1 had been constructed in the dry (799a).

Counsel for S.T.G. urge that the plans and specifications were defective and dangerous to complete because the railroad had specified how blasting should be done, if used adjacent to Pier No. 1. The use of blasting procedures is described by counsel as a dangerous and impossible operation, because a "blow" (a rush of water into the excavation) might occur in using this dry method of construction. They ignore the fact that S.T.G. did not choose the dry method and never attempted to use any blasting procedures, although their own expert testified that the tests showed good rock in the area (430a-431a) and that blasting could be performed immediately adjacent to most sensitive construction, such as pipes and walls (436a-437a).

The evidence conclusively disposes of the unfounded claim that the contractor was bound to excavate in the dry, because S.T.G. itself had no trouble whatsoever in interpreting the plans and specifications to mean that it could accomplish the excavation of the rock either in the wet or in the dry and with or without blasting procedure (69a, 70a, 80a, 81a; Exhibits 7 & 8, 1039a, 1040a).

S.T.G. recognized that it could choose its own construction method and accordingly submitted a sketch and blue print dated February 26, 1960 which set forth a method of pre-drilling along the perimeter of Cells D and E, and F if required, and then driving sheet piling to the required

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tip elevations (Exhibit 8, 1040a). S.T.G.'s president testified (487a, 488a):

> "Q. Did this letter and the enclosed sketch (referring to Exhibits 5 and 8) include a proposal for a construction method by which that sheeting was to get down to minus 45 or minus 40 as the case might be? A. Yes, sir.
>
> "Q. This was the method that S.T.G. Construction Company thought to be feasible and practical for accomplishment of the desired result; is that right?
>
> A. Yes, sir."

This method was approved as generally satisfactory by the railroad's representatives (488a). It was a so-called "wet" method of construction of the cells requiring no blasting and eliminating any question of a blow from lateral pressure. Counsel for S.T.G. refused to face up to the fact that the contractor itself recognized that it could proceed by any approved method of obtaining the desired result, either in the wet or in the dry, and with or without blasting procedures. The wet method suggested by S.T.G. and approved by the railroad eliminated any possibility of a so-called blow and the potential danger which counsel refer to so often, without their mentioning that S.T.G.'s suggested construction method was in the wet and without the use of blasting.

S.I.R.T.'s expert witness, Professor Rutledge, described three permissible methods of construction under the contract and specifications, one of which was the method selected by the contractor S.T.G. However, S.T.G. did not have the competency to carry out its own selected method (Appendix F, p. 41a). A second method was a construction in the dry, using a double cofferdam which eliminated the possibility of a blow of the cell, i.e., the inrush of water and soil as a result of lateral pressure. This was the method suggested in the specifications. A third method

was the simple "glory-hole" method of excavating in the wet with a dredge and then excavating the rock. The contract contemplated this method by providing that the contractor could slope the sides of the excavation (1029a).

The efforts of S.T.G. to comply with its own suggested method of excavating a trench in the rock so that the sheet piling could be placed therein in Cells D and E were almost incredible. The contractor during the 240 days of the contract period attempted only to drill holes in the rock for Cell E. S.T.G. was able to drill holes into the rock with the auger and churn drills but was unable to keep the holes in alignment through the overburden and into the rock (801a).

S.T.G.'s expert, Dr. Feld, admitted that the problem was not the ability to drill holes in the rock but the inability to keep the holes in alignment, so that a trench could be created (434a). Professor Rutledge explained how this could have and should have been done (598a-607a, Exhibits 119A, B, C and D, 1115a-1118a).

In August 1960, S.T.G. admitted its inability to place the fender sheets according to its own selected method. Some of the sheet piling was put in backward (191a, 192a). Interlocks were broken and the cells lost a considerable percentage of their desired and specified strength (192a). The top of the sheet pilings indicated the severe hammering to which they had been subjected and they were bent and distorted below water (191a, 311a, 319a and 320a). The representatives of S.T.G. then criticized the method of construction suggested in the specifications but S.I.R.T., the Army Engineers and the architect-engineer reminded S.T.G. that it had not even attempted the recommended blasting procedure (518a). They directed S.T.G. to complete the job. Only then did S.T.G. obtain an estimate as to the cost and method of blasting but never attempted it (522a-523a).

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The Trial Court found that there were at least three practical and feasible construction methods by which a contractor such as S.T.G. could have constructed the fender cells D, E, F and G under the original plans and specifications. They are described and summarized in the Findings of Fact and Conclusions of Law (Appendix F, pp. 42a, 43a; 802a, 803a) as (1) a wet construction method, known as the "glory-hole" method, a simple dredging job with the creation of a trench under water by drilling and blasting, then setting the sheet pilings in place; (2) another wet method, the pre-drilling method proposed and attempted by S.T.G., but by utilizing a proper template as a guide for driving interlocking casings, then breaking down the web between the holes, creating a trench into which the sheets could be driven, and (3) a dry method of construction utilizing a cut-off wall or exterior cofferdam outside of the fender cells, which would eliminate the possibility of a blow. This was the method suggested by S.I.R.T. There was adequate support for these findings by the Trial Court in the evidence, particularly the testimony of Professor Rutledge (598a-607a, 1115a-1118a).

S.T.G. makes no claim that these findings of the Courts below were clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Procedure. In fact, the findings were clearly correct.

Professor Rutledge testified that the use of a double cofferdam or of a dredge or of a proper template for predrilling were construction methods which are not set forth in plans or specifications (612a). Two of such construction methods contemplated blasting and Professor Rutledge said that they were entirely safe (598a-611a). S.T.G.'s counsel, nevertheless, persist in the statement that this contractor had no choice but to resort to unsafe blasting methods despite the findings of fact, with supporting testimony, that blasting could be safely used. Further-

more, the contractor decided on his own initiative to use the pre-drilling method with no blasting contemplated so that the phantom danger of blasting conjured up by its counsel does not fit the facts.

S.T.G. impliedly admits the use of a double cofferdam was feasible but now urges that this construction method should have been in the specifications. The testimony is clear that construction methods are not set forth in specifications (612a). It is also clear that, if desired, blasting in the dry could have been used with complete safety, with the protection of the double cofferdam.

S.T.G. also urges that a cofferdam could not be employed because it might interfere with navigation in the channel (Petition, pp. 13, 14). This statement is wholly unfounded. There was no channel at the time and place of this construction (997a). The row of piles would be temporary and removable and would not be in the channel as it then existed. The dredging was to be done after completion of the work.

The finding of the Trial Court concurred in by the Court of Appeals that the contract plans and specifications were feasible, practicable and possible of performance by a competent contractor, coupled with the finding that S.T.G. was free to use any engineeringly sound and approved method to accomplish the end result of penetration of the sheet pilings to desired elevations, supported by persuasive and substantial evidence, makes it unnecessary to discuss S.T.G.'s artificial argument that the contract set forth a detailed specification which S.T.G. was required to follow in performing its work. S.T.G. ignores the finding that blasting could have been safely used if desired; it ignores S.T.G.'s own interpretation of the contract, clearly establishing the flexibility of the contract in use of construction methods; it ignores the testimony of Professor Rutledge that it was entirely safe to blast even in the dry by use

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of the double cofferdam and in the wet, of course, with no danger whatsoever; it ignores the finding by the Trial Court that S.T.G. was free to use any approved method to accomplish the end result.

Introduction To Argument

The petition seeks to raise questions of law based on factual premises which are diametrically opposed to the facts as found by the Courts below. No claim is made that the facts as so found are clearly erroneous, and none could be made. In the light of this, the petition states no grounds upon which this Court should grant certiorari.

ARGUMENT

I

No important question of federal law is involved.

S.T.G.'s petition states as its first reason why certiorari should be granted that there is an important question of federal law involved. The argument seems to be that the Government is involved in public construction so that the interpretation of every construction contract involves a question of federal law. This is a strained effort to support the claim that an important question of federal law is involved. If there were any substance to this claim, the interpretation of every private construction contract would be a likely subject for review in this Court.

This Court on occasion has accepted cases involving the interpretation and administration of federal contracts, where there was a recurring problem. See *United States v. Utah Construction & Mining Co.*, 384 U. S. 394 (1966). However, this action does not involve a federal contract or the interpretation and administration of a typical form

of federal government public construction contract. The contract, to which New York law was held applicable (Exhibit 2, 999a-1034a), was between S.I.R.T. and S.T.G. The railroad, as the bridge owner, prepared the plans and specifications for the new bridge. The U. S. Government was not a party to the contract. There was a separate agreement for reimbursement of S.I.R.T. for a percentage of the project cost in accordance with the Truman-Hobbs Act. 54 Stat. 497, 33 U.S.C. §§511-523. The Truman-Hobbs Act is applicable to the limited situation where an existing bridge over a navigable stream constitutes an obstruction to Navigation.

Jurisdiction in the federal court in this case was based upon diversity of citizenship, not upon the involvement of any federal question (Appendix A, p. 1a). The Trial Court found without dispute (Appendix F, p. 50a):

> "1. The law of New York applies to this controversy."

It is clear that the Courts below have not decided an important question of federal law, which has not been, or should be, settled by this Court.

> *S.T.G.'s claim that this Court should determine as a matter of federal law that the specifications in this case were detailed specifications and not a result specification is wholly untenable.*

It is a completely artificial argument of S.T.G. that a question of federal law is involved in determining whether the specifications in this case were detailed specifications or "result" specifications, verbiage which is substantially the invention of the petitioner.

Fundamentally, contract plans and specifications are those which do not permit the contractor to depart from them in any respect or those, as in this case, which are flexible and permit the contractor to use any approved

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method of construction to achieve the end result. These are not "result" specifications, except in the sense that all specifications are directed toward an end result. Basically, S.T.G. claims that the specifications were "admittedly defective" in that blasting was recommended and blasting was "concededly" dangerous and impracticable. The specifications were not defective, nor was there any admission to that effect; the specifications were not dangerous or impracticable and there was no concession to that effect. The finding of fact by the Trial Court was precisely the opposite, namely, that the contract plans and specifications relative to the fender system were practicable and possible of performance by a competent contractor (Appendix F, p. 50a; 810a). The Trial Court also found as a fact that neither the plans and specifications by their terms nor the exigencies of underwater engineering and construction precluded S.T.G. from proceeding to completion by means of one of at least three acceptable methods, to which we have heretofore referred (Appendix F, pp. 50a-51a).

The Court of Appeals found the District Court's view of the case convincing. It stated that the contract apparently contemplated the use of blasting to sink the pilings, but there was also evidence to indicate that the contract need not be read as requiring such a method. Said Court referred to Section IV, Article 5 entitled "Construction Methods," and interpreted it as providing only that rock shall be excavated "by an approved method" and that the work "shall preferably be done in the dry", and requiring otherwise only that the sheet steel be driven to required elevations (Appendix A, p. 7a).

It would seem to serve no useful purpose to comment on the arguments in the petition dealing with government financed competitive contracts, novel and developmental contracts, subsidiary design obligations and definitions of detailed and result specifications because all of these argu-

ments are based on the claim that there was a rigid but defective design. This has been heretofore pointed out as simply not the fact. The completely erroneous statement in the petition is repeated several times (pp. 2, 3, 25) that the only issue in the case is whether the railroad should be held responsible for the "admittedly faulty specified procedures for constructing the cells by sinking the sheet piles into rock." This issue is precluded by the findings below.

In connection with S.T.G.'s claim that the specifications should be interpreted as detailed specifications, S.T.G. states that a cardinal rule of interpretation is that there is no surer way to determine the meaning of a contract provision than to see how the parties have interpreted or have acted under it (Petition, p. 29). In that connection, we call attention to S.T.G.'s interpretation of the contract by submitting as its proposed plan of procedure a pre-drilling method of excavating a trench in the rock, which method was approved. This method was not the plan of procedure recommended in the plans and specifications. This method did not require blasting, so that the flexibility allowed to the contractor was demonstrated by its own interpretation.

Thus, there is no factual support whatsoever for S.T.G.'s claim that the specifications set forth procedures to be strictly followed for achieving rock penetrations of the sheet piles.

There is no important question of federal law involved in the interpretation of this contract and the requirements thereunder. There were only issues of fact which were decided adversely to S.T.G.'s claims by the Courts below.

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II

The Court of Appeals has not decided a federal question in a way which conflicts with decisions of this Court.

S.T.G. refers to *U. S.* v. *Spearin*, 248 U. S. 132 (1918), in an attempt to show a conflict on a federal question between the decision below and decisions of this Court. *Spearin*, where a government contract was involved, is entirely consistent with the decision of the Court of Appeals. In that case the contractor agreed to build a dry dock in the Brooklyn Navy Yard in accordance with plans and specifications provided by the Government. There was a provision for reconstructing a sewer which intersected the site. The contractor followed the plans and specifications and rebuilt the sewer, but back waters burst the new sewer during heavy rain and high tide. The case held that, if the specifications were complied with, there was a warranty that the sewer would be adequate and that the contractor was entitled to recover damages.

Spearin is inapposite because there the contractor followed the plans and specifications, whereas S.T.G. did not attempt to construct the fender system in accordance with the plans and specifications provided. Instead, S.T.G. submitted its own pre-drilling plan which was approved, but S.T.G. could not perform. If, in our case, S.T.G. constructed the fender system in accordance with the contract plans and specifications provided and then the fender system failed, the holding in *Spearin* might have some relevance. However, in view of the fact that the specifications were not required to be followed and the fact that S.T.G. never attempted to follow them, *Spearin* is simply not in point.

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The only other authority for the assertion that the decision below is in conflict with decisions of this Court is a reference by S.T.G. to a footnote in a Court of Claims case (footnote 6 in *National Presto Industries, Inc.* v. *U. S.*, 167 Ct. Cls. 749, 338 F.2d 99, 104 [should be 105], *cert. denied* 380 U.S. 962 (1965)). The footnote reference is to a District Court case. There was no holding in *National Presto* that there were faulty specifications. On the contrary, the Court held that it could not find any warranty or representation by the Government as to equipment to be used in the manufacture of shells. The Court did find a mutual mistake of the parties to the contract and reformed it.

The decisions in the District Court and the Court of Appeals in this case appear to be in harmony with the views of this Court as is indicated in the case of *Norfolk Dredging Co.* v. *U. S.*, 175 Ct. Cl. 594, 360 F.2d 619, *cert. denied* 385 U. S. 919 (1966). There the contractor was to construct a levee of hydraulic fill pumped from adjacent areas designated by the Government. The project was in tidal waters and the plaintiff had difficulty with the conventional method of procedure using a fixed shore pipe line. It used a method called a floating, swinging pipe line and claimed a change in specifications and an adjustment in the price. The Court of Claims referred (175 Ct. Cl. at 605) to the contract specifications which read in part: "The Contractor shall use bleeder pipes, spoons, baffles, *or other devices* during the placing of the hydraulic fill • • •."

The Court of Claims agreed with the Government's views that freedom of choice of means was indicated by the phrase "in such a manner" to achieve a gradual building up of the face of the fill, referring to the conduct of the hydraulic filling, and that freedom of choice was further indicated by the phrase "or other devices" where the con-

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tractor was directed to use bleeder pipes, spoons and baffles.

The Court of Claims said in *Norfolk*, that the contractor's basic responsibility was to achieve a prescribed end result in whatever manner the contract did not expressly prohibit (175 Ct. Cl. at 607). That is precisely the situation in this case where the end result was the placing of the fender sheeting into rock to prescribed elevations to stabilize the cells and no method of achieving this result was prohibited. The freedom of choice of S.T.G. to excavate in the dry or in the wet was clearly established, not only from S.T.G.'s choice to use a wet method of construction but from the very text of the specifications which provide in part for excavation of rock "by an approved method" and "[t]his work shall *preferably* be done in the dry, • • •" (emphasis supplied).

III

The decision by the Court of Appeals is not in conflict with the decision of another Court of Appeals.

The petition does not refer to any decision by any Court of Appeals that conflicts with the decision below. The petitioner resorts to the claim that the decision of the Court of Appeals in this case conflicts with cases determined by the Court of Claims. The Court of Claims cases cited (Petition, p. 30) are inapposite in that they are cases where there were admittedly faulty specifications with change orders involved or where the contractor had performed in accordance with the specifications and the desired result had not been obtained, which was the factual situation in *U. S.* v. *Spearin, supra.* A Court of Claims case cited by S.T.G. is *J. D. Hedin Const.* v. *U. S.*, 171 Ct. Cl. 70, 347 F. 2d 235 (1965). This case and *J. L. Simmons*

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Company, Inc., 67-1 BCA 29, 417, also relied upon by S.T.G. to support its claim that a contractor should not be held responsible for results where the achievement has been rendered impossible by the Government's own specifications, were substantially identical cases in that they arose from use of the very same piling specifications. The basic question in those cases was whether the specifications for the piling were design specifications for which the Government should have been held to assume complete responsibility. The Board of Contract Appeals in *Simmons* said that under the change order in effect the type of piles to be used and the driving requirements for both types of piles "became fixed and absolute to the degree that the contractor had no right or obligation to depart from the terms specified in the change itself" (29,420). This was obviously a design specification and not related to the type of specification in our case. Incidentally, Professor Rutledge and a Mr. Fletcher, witnesses for S.I.R.T. in this case, were witnesses in *Simmons*, and the Board accepted their testimony in *Simmons* as did the Trial Court in our case. The specifications were entirely different.

Consequently, there is no conflict in the decision of the Court of Appeals for the Second Circuit in our case, not only with any case decided by another Court of Appeals but also with cases determined on public construction law by the Court of Claims and the Board of Contract Appeals.

IV

The decision in the Court of Appeals was not a determination of an important state question in a way in conflict with the applicable state law.

The New York State authorities referred to in the petition as indicating a conflict between the decision below and leading case law in the State of New York are not

even remotely related to the issues in this case. The petition asserts that the New York Court of Appeals has held that a result specification should be expressed in the clearest language and cites the case of ***Sweezy*** **v.** ***O'Rourke,*** 226 N. Y. 378, 123 N.E. 752 (1919). It was held therein that a contractor who agreed to drill an artesian well until the pipe reached "water-bearing gravel" had completed his contract, although salt water was produced, because the well driller did not warrant that fresh water would be obtained. That case has nothing to do with a so-called result specification and is in no way in conflict with the decision in this case.

The petitioner also refers to *Cassoff* v. *State of New York,* 44 N.Y.S. 2d 514 (Ct. Cl. 1943), as support for the assertion that a result specification must be clearly stated. There is no such holding in *Cassoff*. The Court of Claims merely stated in its short opinion that if a specific result is contracted for then it must be performed before the claimant is entitled to payment.

Petitioner also lists *Gillet* v. *Bank of America,* 160 N. Y. 549, 55 N.E. 292 (1899), and *Atterbury* v. *Bank of Washington Heights of the City of New York,* 241 N. Y. 231, 199 N.E. 841 (1925) (Petition, p. 18), presumably supporting the same assertion. Again, they are not remotely related to the issues in this case.

Since the decision of the Court of Appeals below is clearly correct, S.T.G.'s petition for certiorari should be denied.

Conclusion

For the foregoing reasons, it is respectfully submitted that S.T.G.'s petition for a writ of certiorari should be denied.

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Respectfully submitted,

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